

GOVERNMENT OF ANDHRA PRADESH
ABSTRACT

Mines & Minerals – APMDC – Beach Sand Minerals exploitation – MOU; Agreement & Shareholders Agreement – Entered with M/s Bothli Trade AG – Cancellation – Orders – Issued.

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INDUSTRIES & COMMERCE (M.II) DEPARTMENT

G.O.Ms.No.66

Dated:10-08-2015

Read the following:-

1. M.O.U. Dt.18.04.2006 entered between GoAP and M/s Bothli Trade AG.
2. Agreement, Dt.24.08.2006 entered between M/s APMDC Ltd., and M/s Bothli Trade AG.
3. Share holders Agreement, Dt.09.10.2007 among M/s APMDC Ltd., and M/s Bothli Trade AG and AP Coastal Sands and Metals Pvt. Ltd.
4. From the VC & MD, M/s APMDC Ltd., Lr.No.APMDC/HMBS/BT.Ag/2006/6469, Dt.11.03.2013.

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ORDER

In the reference 1st read above, the Government of Andhra Pradesh entered into an MOU with M/s Bothli Trade AG, a Company incorporated and registered in Switzerland having office at Rundbuckstrasse, 6-CH -8212, Neuhausen, Am Rheinfall, Switzerland on 18.04.2006.

2. In the reference 2nd read above, a Collaboration Agreement was also entered between M/s. Andhra Pradesh Mineral Development Corporation Limited, Hyderabad and M/s Bothli Trade AG on 24.08.2006.

3. As per Clause xvii of the MoU dated 18.04.2006, the MoU shall come into force from the date of its signing by the parties and shall remain valid for three years or till commencement of commercial production whichever is earlier. It is further agreed the MoU is not a binding agreement and it creates no legal obligations on either party. It is envisaged that definitive agreements for development of Project – I shall be negotiated and concluded by the parties within 3 months from the date of its execution.

4. Under the collaboration agreement dt.24.08.2006, M/s. Bothli and Stork Group intended to establish an Industrial complex for mining and beneficiation of heavy mineral sands and Ilmenite based value added products in the State of A.P by making use of the mineral reserves available in Andhra Pradesh covering an extent of 737 hectares in the areas of Lawsons bay, Bhimunipatnam, Konada, Kandivalasa, and Koyyam deposits spread over 50 km of Vijayanagaram and Visakhapatnam districts and in an extent of 7500 hectares spreaded in the areas of Bendicreek – Barua – Donkuru deposit in the district of Srikakulam. The Director, Mines & Geology, after examining the feasibility of mining in the entire extent, advised reduction of lease area from 7500 ha to 3618 ha.

5. As per Clause 2 of the agreement, formation of a Joint venture company between M/s. APMDC and M/s. Bothli is envisaged, and according clause 3, M/s. Bothli shall invest Rs.70 to 90 Crores in the Project. Clause 5 (iv) stipulated that

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Bothli shall not sell or transfer in any manner, whatsoever, its shares in the JVCs in Project – I and Project – II, from the date of acquisition of shares by them until the expiry of the period of 3 years from the date of subleasing the mining lease in favour of JVC completions of Project I & II, whichever is later. Clause 5 (v) provided that the mining lease will be held by the corporation and that it will be subleased to the JV to be formed between the APMDC and Bothli. Clause 15 provides that Bothli shall implement Project –I within three years from the date of sanction of mining lease in favour of APMDC and subleasing of the same to JV. As per Clause 8 & 14 of collaboration agreement dt.24.08.2006, Bothli was obligated to bear all the necessary expenses for obtaining the clearances. APMDC informed Bothli vide Letter dated 21.06.2010, to deposit a sum of Rs.3 Crores for obtaining all the necessary clearances/permissions.

6. The Clause 10.1.4 of Subscription and Shareholders Agreement precludes Bothli from transferring/assigning its shareholding to any third party within three years period from the date of implementation of the project. Clause 15 stipulates that unless otherwise mutually agreed in writing between the parties no party shall transfer, grant any security interest over or otherwise dispose of or give any person any right or over any share or interest in the Joint Venture company unless it is permitted or required to do so under the agreement.

7. M/s Bothli Trade AG has violated the following terms and conditions:

- (i) APMDC's request to deposit Rs.43.36 lakhs for purchase of detailed exploration report from Atomic Minerals Division is not complied by M/s. Bothli. The amount is not deposited till date.
- (ii) APMDC's request to M/s. Bothli on 15.05.2007 for submission of terms of reference to Ministry of Environment & Forests, for obtaining the environmental clearance is not complied with.
- (iii) APMDC's request to M/s. Bothli on 16.07.2007 to submit the application for obtaining license from Department of Atomic Energy as per AER 2004 is not complied as on date.
- (iv) The MoU came into force from the date of its signing by the parties and is valid for three years or till commencement of commercial production whichever is earlier. The three year period expired on 17.04.2009 and till date commercial production has not commenced thereby Clause xvii of MoU dated 18.04.2006 makes MoU inoperative and redundant.
- (v) Bothli Vide Ir.Dt.15.07.2010 have paid Rs.40 Lakhs in response to APMDC's Letter dt.21.06.2010 to deposit a sum of Rs. 3 Crores towards advance for obtaining necessary clearances, which again is in violation of Clauses 8 & 14 of collaboration agreement dt.24.08.2006.
- (vi) During the period between 24.08.2006 i.e., date of entering into the Collaboration Agreement and 09.10.2007 i.e., date of entering into the Shareholder and Subscription Agreement, GEMM Ltd., took over Bothli without any information to APMDC or the written consent of APMDC, in clear violation of Clause 5 (v) and Clause 15. The shareholder's agreement which was signed on 9th October 2007 between APMDC & Bothli Trade AG does not mention anything about the acquisition of Bothli by GEMM. This information appears to have been deliberately suppressed by Bothli Trade AG.

- (vii) Bothli Trade AG, subsequently informed GEMM holds 92.5% shares in Bothli Trade AG, much after the execution of Share Subscription Agreement. The act of Bothli in transferring its share and interest in favour of GEMM Ltd., amounts to disposing of its right over its share and interest in the Joint Venture company, which is in breach of Clause 15 of the Shareholder and Subscription Agreement dt.09.10.2007.

The above said transfer of majority stake in favour of GEMM Ltd., is also in violation of Clause 5 (iv) of the collaboration agreement dt.24.08.2006, which mandates Bothli shall not sell or transfer in any manner, whatsoever, its shares in the JVCs in Project – I and Project – II, from the date of acquisition of shares by them until the expiry of the period of 3 years from the date of subleasing the mining lease in favour of JVC completions of Project I & II, whichever is later.

- (viii) The action of Bothli in not informing GEMM Ltd's acquisition of its 92.5 shares to APMDC and entering into the Share subscription agreement on 09.10.2007 without revealing the fact of acquisition to APMDC clearly amounts to active concealment of a fact by Bothli having knowledge of the said fact. Having committed such an act of fraud Bothli has absolutely no right or entitlement to continue in any kind of contractual relationship with APMDC.
- (ix) The MOU as well as the Collaboration Agreement stipulate that unless and until the Government of India and Govt. of A.P, accord appropriate clearances, the question of granting of a mining lease does not arise. As of now, there is no grant of mining lease in favour of M/s. Bothli Trade AG. All the mining leases are in application stage and no mining activity has commenced despite the formation of JVC on 04.09.2007.
- (x) Though clause 3 of the agreement envisages an investment of Rs.70 to 90 crores in the project, no attempt is made by M/s. Bothli in commencing the construction of mining and beneficiation Complex in the coastal areas of Srikakulam, Vijayanagaram and Visakhapatnam or any semblance of investment made in discharge of its obligations as mandated under Section 3.
- (xi) As per Clause 5(v) and Clause 15 of Collaboration Agreement dt.24.08.2006 the mining lease has to be transferred in favour of Joint Venture Company. APMDC vide its letter dated 24.09.2007 requested the DMG to arrange for approval from Government of India under Section 6(1) (B) of MMDR Act 1957 as the applied areas exceeds 10 SqKms. The DMG requested the Government of A.P to arrange for approval of Government of India, under Sec 6(1) (B) of MMDR Act 1957. However, Government of India vide Ir.dt.1.2.2010, stipulated the mining lease granted shall not be transferable.

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8. In addition, Section 5(1) of Mines & Mineral (Development & Regulation) Act 1957 read thus:-

(i) A State Government shall not grant a Mining lease to any persons unless such person

(a) is a Indian National or a Company as defined in sub section (1) of Sec (3) of the Companies Act 1956, and

(b) Satisfies such conditions as may be prescribed.

Provided that in respect of any mineral specified in the 1st Schedule, no Mining lease shall be granted except with the previous approval of the Central Government.

Accordingly, State Government shall not grant a Mining lease to any persons unless such person is either an Indian National or a Company as defined in sub section (1) of Sec (3) of the Companies Act 1956.

The aforementioned reasons show the MOU and the Collaboration Agreement are not capable of implementation in view of series of violations of the concluded agreements by M/s. Bothli Trade AG, which make the agreements unenforceable, apart from the statutory impediments.

9. APMDC vide Lr.dt.25.01.2012 informed GoAP JVC has not conducted any Board meetings, that Bothli has not informed about acquisition of shares by GEMM before entering into Share Holder Agreement dt.09.10.2007 and the stipulation of GOI on the nontransferable nature of Mining Lease and requested the Government of Andhra Pradesh to review the progress of the Project, under clause 21 of the Agreement dt.24.08.2006 for future course of action with M/s. Bothli Trade AG.

10. Further, APMDC informed M/s. Bothly Trade AG on 21.11.2012 of its intention to terminate the existing agreements and the reply dt.05.12.12 submitted by M/s. Bothly AG has not touched upon any of the aspects raised by M/s. APMDC and the reply of M/s. Bothly Trade AG is found to be far from satisfactory. Subsequently, on 05.01.2013, the Principal Secretary Department of Mines GoAP, and Chairman APMDC, called M/s. Bothly Trade AG for a meeting in person to present their explanation for delay in implementation of the project. Bothli was asked to submit any proof regarding their ownership and authenticity of their corporate structure with legal opinion on or before 21.01.2013. M/s. Bothli Trade AG submitted their response along with the documentary evidence on 11.2.13 which revealed all the entities viz., Bothli Trade AG, OST Chemical Holding and GEMM are a part of larger company named Group DF. At this meeting M/s. Bothli conceded information regarding transfer of shares from OST Chem to GEMM was not provided to APMDC before signing the Share Subscription Agreement on 09.10.2007.

11. It is noticed that sufficient opportunity is accorded to M/s. Bothli Trade AG to explain the reasons for non-implementation of the Project for which no

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adequate or satisfactory explanation is forthcoming from the company. No investment is made on the field and hardly any effort is put in by M/s. Bothli Trade AG to secure either the mining plans or the Terms of Reference required for obtaining the environmental clearance. More importantly, they have indulged in fraud by keeping APMDC in dark about taking over of Bothli by another company, which defeats the very spirit of the MoU dt.18.06.2006 and Collaboration agreement dt.28.04.2006. In such circumstances, it is observed that the project being a non starter and APMDC being an instrumentality of state is losing huge amounts in terms of public revenue which otherwise would have earned had M/s. Bothli been more diligent. It is further observed affording any further opportunity at this stage to Bothli would only be an empty formality and would serve no purpose.

12. In view of the request of the VC & MD, APMDC, the Government of Andhra Pradesh, after careful consideration to the relevant circumstances and due application of its mind to the multiple violations of the concluded agreements by M/s. Bothli Trade AG, exercised its power of review under clause 21, accorded its permission to VC & MD, APMDC, Hyderabad to cancel MoU dt.18.04.2006 and the agreement dt.24.08.2006 and other concluded agreements, between M/s. APMDC limited and M/s. Bothli Trade AG.

13. The Vice Chairman & Managing Director, M/s A.P. Mineral Development Corporation Ltd., A.P., Hyderabad shall take necessary further action accordingly in the matter.

[BY ORDER AND IN THE NAME OF THE GOVERNOR OF ANDHRA PRADESH]

S.S.RAWAT
SECRETARY TO GOVERNMENT

To
The VC & MD, M/s APMDC Ltd., A.P., Hyderabad.
M/s Bothli Trade AG, Regd. office at Rundbuckstrasse,
6-CH -8212, Neuhausen, Am Rheinfall, Switzerland.

Copy to: The DMG, AP, Hyd.
PS to Chief Secretary to Govt. of AP.
PS to Prl. Secy. to CM.
PS to Secy. to Govt., Ind. & Com. Dept.
PS to M(M&G)

//FORWARDED :: BY ORDER//

SECTION OFFICER

